Mohd Sofi bin Abdul Ghafar v Ketua Pengarah Insolvensi & Anor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-21NCVC-27–06 OF 2020
SM KOMATHY J
21 MAY 2021

Civil Procedure — Striking out — Application to strike out plaintiff's claim — Whether the statement of claim disclosed reasonable cause of action — Whether the claim was frivolous and vexatious and an abuse of court process — Rules of Court 2012 O 18 r 19

Tort — Misfeasance in public office — Whether plaintiff has cause of action — Whether the claim was based on private or public law elements

This was the defendants' application under O 18 r 19(1)(a), (b) and (d) of the Rules of Court 2012 ('the ROC') to strike out the plaintiff's claim. The plaintiff was adjudged a bankrupt in November 1998 and again in March 1999, and the first defendant was appointed to administer his estate in bankruptcy. A total number of 13 creditors duly filed their proof of debts, including the Inland Revenue Board for a sum of RM277,913.08. Sometime in 2016, the plaintiff asked to be discharged under s 33A of the Insolvency Act 1967 ('the Act') and received a favourable response from the first defendant. On 23 November 2019, the first defendant informed the plaintiff that he had been discharged from bankruptcy under s 33A and a certificate of discharge was issued in February 2020. However, the first defendant declined to release the amount in the plaintiff's bankruptcy estate in the sum of RM1,673,712.20 and stated that it intended to utilise the monies to pay the Inland Revenue Board the sum of RM76,211.52 and the balance to be paid pari passu to the 13 creditors including the Inland Revenue Board. The plaintiff was dissatisfied with the decision, hence he commenced an action against the defendants alleging that the first defendant had committed misfeasance in public office in relation to the administration of his estate in bankruptcy, whereas the second defendant was vicariously liable for the first defendant's action. The defendants applied to strike out the plaintiff's action and contended that the statement of claim did not disclose a reasonable cause of action in view of ss 60, 69 and 74 of the Act. Further, the defendants argued that the plaintiff's action was frivolous, vexatious and an abuse of the court's process as the correct mode to challenge the first defendant's decision was by way of judicial review under O 53 of the ROC. The defendants also contended that the plaintiff ought to have proceeded via the procedures in ss 86 and 92 of the Act. The plaintiff

argued that the first defendant's power in administering the plaintiff's estate was not unlimited and must come to an end upon the discharge of the same. He also argued that s 74 did not render the action unmaintainable but rather it only protected the first defendant from being sued in his personal capacity for damages. Further, the plaintiff contended that O 53 of the ROC was inappropriate as the case was founded on the tort of misfeasance in public office. The plaintiff also contended that ss 86 and 96 did not apply as he was no longer a bankrupt and neither was he seeking to challenge any order made by the High Court under its bankruptcy jurisdiction.

Held, dismissing the application:

(1) The question of law that the plaintiff raised in this action was novel and complex and had not been tested in the local courts and, in the court's view, required the scrutiny of a full trial. It was trite law that so long as the statement of claim disclosed some cause of action or raised some issue to be tried, the mere fact the case was weak and not likely to succeed was no ground for striking it out. The draconian power of the court to strike out a claim at the interlocutory stage under limb (a) of O 18 r 19(1) of the ROC should only be exercised if it was patently clear that there was no reasonable cause of action on the face of the pleadings (see para 30).

(2) The learned judge agreed with the plaintiff that s 74 of the Act did not apply as the plaintiff was not seeking damages against the first defendant in this action but directions and declarations against his office and vicariously against the second defendant. The first defendant could not rely on the immunity in s 74 to contend that this action was unsustainable. For those reasons, the learned judge was not satisfied that the plaintiff's action could be struck out as disclosing no reasonable cause of action on the basis of ss 60, 69 and 74 of the Act (see paras 31–32).

(3) The learned judge accepted the plaintiff's submission that ss 86 and 92 of the Act had no application to the instant case as the plaintiff was no longer a bankrupt and neither was he seeking to challenge any order made by the High Court under its bankruptcy jurisdiction. It was clear that a claim based on the tort of misfeasance in public office was based on both public and private law elements, and that being so, O 53 of the ROC which applied to public law complaints did not apply (see paras 33 & 38).

[Bahasa Malaysia summary

Ini adalah permohonan defendan di bawah A 18 k 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk membatalkan tuntutan plaintif. Plaintif telah diisytiharkan bankrap pada November 1998 dan sekali lagi pada Mac 1999, dan defendan pertama dilantik untuk mentadbir harta pusakanya memandangkan kedudukannya sebagai seorang bankrap. Seramai

A 13 pemiutang telah memfailkan bukti hutang mereka, termasuk Lembaga Hasil Dalam Negeri dengan jumlah sebanyak RM277,913.08. Sekitar tahun 2016, plaintif meminta untuk dilepaskan dari kebankrapan di bawah s 33A Akta Insolvensi 1967 ('Akta) dan dipersetujui oleh defendan pertama. Pada 23 November 2019, defendan pertama memaklumkan kepada plaintif bahawa
B beliau telah dilepaskan dari bankrap di bawah s 33A dan sijil pelepasan dikeluarkan pada Februari 2020. Walau bagaimanapun, defendan pertama menolak untuk melepaskan jumlah dalam harta plaintif dalam jumlah RM1,673,712.20 dan menyatakan bahawa wang tersebut akan digunakan untuk membayar Lembaga Hasil Dalam Negeri berjumlah RM76,211.52 dan
C bakinya akan dibayar pari passu kepada 13 pemiutang termasuk Lembaga Hasil Dalam Negeri. Plaintif tidak berpuas hati dengan keputusan itu, justeru, dia telah memfailkan tindakan terhadap defendan-defendan atas dakwaan salah laku di pejabat awam berhubung dengan pentadbiran harta pusakanya
D dalam keadaan bankrap, manakala defendan kedua bertanggungjawab ke atas tindakan defendan pertama. Defendan memohon untuk membatalkan tindakan plaintif dan membantah bahawa penyataan tuntutan tidak mendedahkan tuntutan yang munasabah menurut ss 60, 69 dan 74 Akta. Selanjutnya, defendan berhujah bahawa tindakan plaintif adalah
E meremehkan, menyusahkan dan merupakan penyalahgunaan proses mahkamah sebagai alasan untuk mencabar keputusan defendan pertama kerana tuntutan sepatutnya dibuat melalui semakan kehakiman di bawah A 53 KKM. Defendan juga berhujah bahawa plaintif sepatutnya mematuhi keperluan prosedur dalam ss 86 dan 92 Akta. Plaintif berhujah bahawa kuasa
F defendan pertama dalam mentadbir harta plaintif adalah tidak terhad. Plaintif juga berhujah bahawa s 74 tidak menjadikan tindakan itu tidak boleh dipertahankan tetapi sebaliknya ia hanya melindungi defendan pertama daripada disaman atas kapasiti peribadinya untuk ganti rugi. Selain itu, plaintif berhujah bahawa A 53 KKM adalah tidak sesuai kerana kes itu diasaskan atas
G tort misfeasance di agensi awam. Plaintif juga berhujah bahawa ss 86 dan 96 tidak terpakai kerana beliau bukan lagi seorang bankrap dan beliau juga tidak berusaha untuk mencabar apa-apa perintah yang dibuat oleh Mahkamah Tinggi di bawah bidang kuasa kebankrapannya.

H **Diputuskan**, menolak permohonan:

(1) Persoalan undang-undang yang dibangkitkan oleh plaintif dalam tindakan ini adalah baru dan kompleks dan tidak pernah diuji di mahkamah. Pada pandangan mahkamah ini, kes ini memerlukan penelitian perbicaraan penuh. Adalah menjadi undang-undang mantap
I bahawa yang selagi kenyataan tuntutan mendedahkan beberapa kausa tindakan atau membangkitkan beberapa isu yang perlu dibicarakan, dakwaan bahawa kes itu lemah dan tidak mungkin berjaya bukanlah satu alasan untuk membenarkan permohona ini. Kuasa mahkamah untuk membatalkan tuntutan di peringkat interlokutori menurut A 18 k 19

KKM hanya boleh dilaksanakan sekiranya jelas tiada ada sebab yang munasabah di dalam pliding (lihat perenggan 30).

(2) Hakim yang terpelajar telah bersetuju dengan plaintif bahawa s 74 Akta tidak terpakai kerana plaintif tidak memohon ganti rugi terhadap defendan pertama dalam tindakan ini tetapi arahan dan deklarasi dibuat terhadap defendan kedua. Defendan pertama tidak boleh bergantung kepada imuniti dalam s 74 untuk menyatakan bahawa tindakan ini tidak dapat disangkal. Atas alasan-alasan tersebut, hakim yang terpelajar tidak bersetuju bahawa tindakan plaintif boleh ditolak kerana tidak mendedahkan alasan yang munasabah menurut ss 60, 69 dan 74 Akta (lihat perenggan 31–32).

(3) Hakim yang terpelajar menerima hujahan plaintif iaitu ss 86 dan 92 Akta tidak terpakai di dalam kes ini kerana plaintif tidak lagi bankrap dan beliau juga tidak mencabar mana-mana perintah Mahkamah Tinggi di bawah bidang kuasa kebankrapannya. Adalah jelas bahawa tuntutan ini adalah berdasarkan tort misfeasance di agensi awam berdasarkan elemen undang-undang awam dan peribadi. Oleh itu, A 53 KKM yang terpakai kepada tuntutan melalui undang-undang awam tidak terpakai di dalam kes ini (lihat perenggan 33 & 38).]

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145; [2010] 5 CLJ 865, FC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor [2012] 2 MLJ 8, FC (refd)

Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16, SC (refd)

Tony Pua Kiam Wee v Government of Malaysia and another appeal [2019] 12 MLJ 1, FC (refd)

Legislation referred to

Insolvency Act 1967 ss 33A, 33B(4), 35(1) 60, 69, 74, 86, 92
Rules of Court 2012 O 18 r 19, O 18 r 19(1)(a), (1)(b), (1)(d), O 53
Rules of the High Court 1980 O 53

K Roy Sreenivasan (Lachaman Lalachand Assoc) for the plaintiff.
Siti Rafidah bt Zainudin (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

SM Komathy J:

THE APPLICATION

[1] Mohd Sofi bin Abdul Ghafar ('the plaintiff') has commenced this action against the Director General of Insolvency ('the first defendant') and Government of Malaysia ('the second defendant'). The plaintiff alleges that the first defendant has committed misfeasance in public office in relation to the administration of his estate in bankruptcy. The second defendant as the Government of Malaysia is said to be vicariously liable for the actions of the first defendant.

[2] The defendants have applied under O 18 r 19(1)(a), (b) and (d) of the Rules of Court 2012 to strike out the action.

BACKGROUND FACTS

[3] The plaintiff was adjudicated a bankrupt by the Shah Alam High Court, on 11 November 1998 and again by the Kuala Lumpur High Court on 16 March 1999. The first defendant was appointed to administer the plaintiff's estate in bankruptcy.

[4] A total number of 13 creditors duly filed their proof of debts, including Lembaga Hasil Dalam Negeri for a sum of RM277,913.08.

[5] Sometime in 2016, the plaintiff wrote in to the first defendant asking to be discharged under s 33A of the Insolvency Act 1967 and received a favourable response from the latter.

[6] The first defendant then issued the relevant notices under s 33A of the Insolvency Act to all creditors who had filed proof of debts. Six objections were received. The first defendant rejected the objections of the said creditors by letter dated 2 July 2018. None of the creditors applied within 21 days to the High Court under s 33B(4) of the Insolvency Act to object to the issuance of the certificate of discharge.

[7] By a letter dated 23 November 2019, the first defendant informed the plaintiff that he had been discharged from bankruptcy pursuant to s 33A of the Insolvency Act and requested the payment of RM10 for the issuance of the certificate of discharge. This was paid by the plaintiff on 13 January 2020. The first defendant issued the certificate on 11 February 2020. The certificate of discharge stated that the plaintiff had been discharged as a bankrupt as at 30 November 2018.

[8] At the date of the plaintiff's discharge, the amount in his bankruptcy estate was the sum of RM1,673,712.20. The first defendant declined to release the monies to the plaintiff stating that he intended to utilise the monies to pay Lembaga Hasil Dalam Negeri the sum of RM76,211.52 to, and the balance of RM1,597,501.08 to be paid pari passu to the 13 creditors including Lembaga Hasil Dalam Negeri.

[9] The plaintiff was dissatisfied and in June 2020, instituted this action against the defendants alleging that the first defendant has committed misfeasance in public office in administration of his estate in bankruptcy in two ways. First, by failing to pay the full sum of RM277,913.08 to Lembaga Hasil Dalam Negeri as a priority creditor. Second, by intending to make payment of the sum of RM1,395,799.42 to the 13 former creditors after the date on which his legal obligation to make payments has ceased. The plaintiff alleges that the first defendant knows that he has no power to do the acts complained of and that the acts will probably injure the plaintiff.

[10] The defendants responded by filing the present application to strike out the action.

PARTIES' SUBMISSIONS

Case for the defendants

[11] In support of the application to strike out the proceedings, the defendants contends that the statement of claim does not disclose a reasonable cause of action in view of ss 60, 69 and 74 of the Insolvency Act.

[12] The defendants argue that the plaintiff's complaints (at [10]), which form the crux of the plaintiff's case, are without any legal basis. The defendants submit that the first defendant is factually and legally both entitled and empowered to do the acts complained of under ss 60 and 69 of the Insolvency Act. They argue that it is the duty of the first defendant, notwithstanding the plaintiff's discharge to continue to administer his bankruptcy estate until all his creditors have been paid in full as s 60 does not set any time limit for the first defendant to administer the property of a bankrupt,

[13] The defendants further submit that that by reason of s 69, the plaintiff can only claim for the release of the surplus in his account, only if there is a remaining balance, after all the creditors have been paid in full.

[14] The defendants also contend that the plaintiff has no cause of action as s 74 of the Insolvency Act confers statutory immunity upon the defendants against any civil claims.

[15] The defendants further argue that in any event, this action is frivolous and vexatious and an abuse of the court's process as the correct mode to challenge the decisions of the first defendant is by way of judicial review under O 53 of the Rules of Court 2012. The defendants submit that the claim here involves public law complaints which should have been pursued (if at all) by judicial review within the strict time limits prescribed for such actions. As such, this action, they argue, is an abuse of the court's process. In this regard, reliance is placed on the decision of the Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; [2010] 5 CLJ 865.

[16] Additionally, the defendants contend that the plaintiff ought to have proceeded by way of the domestic procedure laid down under ss 86 and 92 of the Insolvency Act to seek remedy for his complaints. They argue that it is trite law that where special provision is made in a statute as in ss 86 and 92, these provisions exclude the operation of a general provision in the general law. They cite in support the decision of the Federal Court in *Lau Keen Fai v Lim Ban Kay @ Lim Chiam Boon & Anor* [2012] 2 MLJ 8.

Case for the plaintiff

[17] In response, the plaintiff vigorously contends that the proceedings cannot and ought not to be struck out in limine. The plaintiff asserts that a point of importance is raised by the present proceedings. Surely, he argues, that the powers of the first defendant's to administer the estate of a bankrupt is not unlimited and must come to an end upon the discharge of the bankrupt. The plaintiff submits that as a result of his discharge, all debts owing to creditors have been wiped out and that he would suffer injury or harm if the first defendant makes payment to the 13 creditors in breach of s 35(1) of the Insolvency Act.

[18] The plaintiff also contends that as the first defendant's decision to pay Lembaga Hasil Dalam Negeri only the sum of RM76,211.52, instead of the full sum RM277,913.08 claimed by it, may harm him as he may be sued and bankrupted by the Lembaga Hasil Dalam Negeri, in the near future.

[19] The plaintiff further contends that s 74 of the Insolvency Act does not render this action unmaintainable but only protects the first defendant from being sued in his personal capacity for damages. The plaintiff points out that the said section does not apply to the instant case as no damages is sought against the first defendant in this action.

[20] The plaintiff also argues that judicial review under O 53 is not appropriate and does not apply to a case founded on the tort of misfeasance in

public office and relies on the decision of the Federal Court in *Tony Pua Kiam Wee v Government of Malaysia and another appeal* [2019] 12 MLJ 1.

[21] Lastly, the plaintiff contends that ss 86 and 92 of the Insolvency Act have no application to the instant case as he is no longer a bankrupt and neither is he seeking to challenge any order made by the High Court under its bankruptcy jurisdiction.

THE LAW ON STRIKING OUT

[22] The principles that govern an application to strike out an action are well established. Pursuant to O 18 r 19 of the Rules of Court 2012, an action may be struck out if it 'discloses no reasonable cause of action or defence', it is 'scandalous, frivolous or vexatious', it may 'prejudice, embarrass or delay the fair trial of the action', or it is otherwise an 'abuse of process'.

[23] It is well established that a court deciding a striking out application must consider whether the action is 'plainly or obviously unsustainable' or whether there are other reasons relating to the abuse of process and impossibility of a fair trial that justify striking out the action. See *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (SC) and *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 (SC).

[24] With these principles in mind, I turn to the validity of the arguments of the parties. Statutory provisions

[25] The arguments advanced by the parties require an examination of the following provisions in the Insolvency Act.

35 Effect of discharge

(1) Subject to this section and any condition imposed by the court under *section 33*, where a bankrupt is discharged, the discharge shall release him from all his debts provable in the bankruptcy but shall have no effect —

(a) on the functions (so far as they remain to be carried out) of the Director General of Insolvency; or

(b) on the operation, for the purposes of the carrying out those functions, of the provisions of this Act.

(2) A discharge shall not release the bankrupt from

(a) any debt, due to the Government of Malaysia or of any State; or

(b) any debt with which the bankrupt may be chargeable at the suit of

(i) the Government of Malaysia or of any State or any other person for

any offence under any written law relating to any branch of the public revenue; or

(ii) any other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence; or

(c) any provable debt which he incurred in respect of, or forbearance in respect of which was secured by means of, any fraud or fraudulent breach of trust to which he was party; or

(d) any liability in respect of a fine imposed for an offence.

(3) A bankrupt may be discharged from any of the debts excepted under subsection (2) by a certificate in writing of the Minister of Finance in the case of a debt due to the Government of Malaysia or the Menteri Besar or Chief Minister of any State in the case of a debt due to the State or of the Attorney General in the case of such bail bond as is referred to in subsection (2).

(4) An order of discharge or a certificate of discharge shall be conclusive evidence of the bankruptcy and of the validity of the proceedings therein, and in any proceedings that are instituted against a bankrupt who has obtained an order of discharge or a certificate of discharge in respect of any debt from which he is released by the order or certificate the bankrupt may plead that the cause of action occurred before his discharge.

(5) A discharge shall not release any person other than the bankrupt from any liability (whether as partner or co-trustee of the bankrupt or otherwise) from which the bankrupt is released by the discharge, or from any liability as surety for the bankrupt or as a person in nature of such a surety.

60 Powers of Director General of Insolvency to deal with property

Subject to this Act, the Director General of Insolvency may —

(a) sell all or any part of the property of the bankrupt, including the good-will of his business, if any, and the book-debts due or growing due to him, by public auction or private contract, with power to transfer the whole thereof to any person or company or to sell the same in parcels;

(b) give receipts for any money received by him, which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof;

(c) prove, rank, claim, and draw a dividend in respect of any debt due to the bankrupt;

(d) exercise any powers, the capacity to exercise which is vested in the Director General of Insolvency under this Act, and execute any powers of attorney, deeds and other instruments for the purpose of carrying into effect this Act;

(e) deal with any property to which the bankrupt is beneficially entitled sui juris, or other owner of an estate of inheritance less than an estate in perpetuity, in the same manner as the bankrupt might have dealt with it; and any such dealing with any property to which the bankrupt is before

his discharge so entitled shall, although the bankrupt is dead at the time of that dealing, be as valid and have the same operation as though the bankrupt were then alive.

69 Rights of bankrupt to surplus

The bankrupt shall be entitled to any surplus remaining after payment in full of his creditors, with interest as by this Act provided, and for the costs, charges and expenses of the proceedings under the bankruptcy petition

74 Protection of Director General of Insolvency and person acting under his direction or control

The Director General of Insolvency or any person acting under his direction or control shall not be liable personally in any action or proceeding in respect of anything done or intended or omitted to be done under this Act but any person aggrieved by anything so done or intended or omitted to be done may apply to the court for directions in the matter and the court may thereupon give such directions or make such order as it thinks fit.

86 Appeal to court against Director General of Insolvency

If the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the Director General of Insolvency, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

92 Appeals in bankruptcy

(1) The court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

(2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable.

(3) For the purposes of this section the Director General of Insolvency shall be deemed to be aggrieved by the refusal of any application made by him to the court.

WHETHER STATEMENT OF CLAIM DISCLOSES NO REASONABLE CAUSE OF ACTION

[26] The plaintiff's claim is based on the tort of misfeasance in a public office. The essence of the tort is an act done by a public officer or public body where:

(a) the act is done maliciously or with the knowledge that it is ultra vires the powers of the public body;

(b) it is foreseeable that the act would cause damage to the plaintiffs; and

(c) the act actually does cause damage to the plaintiffs.

A **[27]** The act the plaintiff complains of in this case is the act of the first defendant in purporting to distribute his estate in bankruptcy after he has been discharged as a bankrupt. The crux of the plaintiff's case is that the first defendant knows by virtue of s 35(1) of the Insolvency Act, he has no such power to do the acts he complains of and that these acts will probably injure
B him.

[28] In order to succeed in this action, the plaintiff must show, among others, that the first defendant's power to administer the bankruptcy estate of a bankrupt comes to an end when he is given a discharge. There are no decided
C cases on this point.

[29] The defendants have cited any authority in support of the position they take in relation to ss 60 and 69 of the Insolvency Act.

D

[30] The question of law the plaintiff raises in this action is novel and complex and has not been tested in the local courts and, in my judgment, requires the scrutiny of a full trial. It is trite law that so long as the statement of claim discloses some cause of action or raise some issue to be tried, the mere fact
E the case is weak and not likely to succeed is no ground for striking it out. The draconian power of the court to strike out a claim at the interlocutory stage under limb (a) of O 18 r 19(1) should only be exercised if it is patently clear that there is no reasonable cause of action on the face of the pleadings.

F **[31]** The next question I need to address is whether the plaintiff has a cause of action against the defendants in view of s 74 Insolvency Act. I agree with the plaintiff that s 74 does not apply here as the plaintiff is not seeking damages against the first defendant in this action but directions and declarations against his office, and vicariously against the second defendant. This being so, the first
G defendant cannot rely on the immunity in s 74 to contend that this action is unsustainable.

[32] For these reasons, I am not satisfied that the plaintiff's action can be struck out as disclosing no reasonable cause of action on the basis of ss 60, 69
H and 74.

Whether the plaintiff's claim frivolous and vexatious and an abuse of the court's process

I **[33]** I turn now to the defendants submission that the action here is frivolous and vexatious and an abuse of the court's process as the plaintiff ought to have challenged the first defendant's decision in accordance with the procedure laid down in ss 86 and 92 of the Insolvency Act. Again, having examined the provisions, I accept the submission of the plaintiff that they have no

application to the instant case as the plaintiff is no longer a bankrupt and neither is he seeking to challenge any order made by the High Court under its bankruptcy jurisdiction.

[34] That brings me to the defendants argument that this action is an abuse of the process of court as the correct mode of challenging the decision of the first defendant is by way of judicial review as the claim is based on public law. The defendants cited *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* in support of their argument. It is now necessary to consider the case in some detail. There, the appellant, a government officer, absented himself from work following a dispute with his superiors. He was dismissed from service. The appellant filed a writ of summons and statement of claim against the respondents seeking, inter alia, a declaration that his dismissal was null and void, and damages for wrongful dismissal. The appellant's action was struck out in the High Court. His appeal to the Court of Appeal was dismissed. The appellant obtained leave to appeal to the Federal Court on two questions, viz: (i) whether pursuant to the amended O 53 of the Rules of the High Court 1980, an application to challenge the decision of a public authority could only be instituted by way of judicial review under O 53 of the RHC; and (ii) whether challenging the decision of a public authority by way of writ and statement of claim, instead of through an application for judicial review under O 53 of the RHC, constituted an abuse of the process of court. The appellant's main contention was that the procedure under O 53 of the RHC was not a mandatory procedure — a person aggrieved with the decision of a public body could therefore seek relief by way of writ or originating summons.

[35] The Federal Court explained at [34], [61] and [63]:

> From the persuasive authorities above, we observed that for the appellant to be amenable for judicial review there must be the presence of an element of public law necessary to attract remedies of administrative law. We detected the presence of this in our instant case both from the source as well from the nature of the decision itself. The appellant was an officer within reg 3 of the Public Officers (Conduct and Discipline) Regulations 1993 (Amended) 2002 ('the Regulations'). 'Officer' under this regulation 'means a member of the public service of the Federation'. This Regulation is a statutory enactment made in pursuant to cl (2) of art 132 of the Federal Constitution and it applies to an officer throughout the period of his service. He was absent from work without leave or without prior permission or without reasonable cause for seven consecutive working days and cannot be traced ...
>
> We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public

A and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O 53 of the RHC is
B not suitable ...

As to the second question, we are of the firm conviction that the appellant's claim for infringement of his rights by the respondents is based solely on public law. There is no trace of private law involvement nor do the circumstances justify it to be an exception to the general rule. For this, we agree with the courts below that the
C appellant's writ should be struck off as an abuse of the court's process.

[36] I accept the defendants submission that the Federal Court decided that it is generally an abuse of process to pursue by way of an ordinary civil claim complaints falling within the scope of judicial review.
D

[37] The question then arises, is the plaintiff's claim that the first defendant has committed misfeasance in public office based solely on public law to fall within the scope of judicial review. It is instructive in this regard to refer to the
E case of *Tony Pua Kiam Wee v Government of Malaysia and another appeal* [2019] 12 MLJ 1. There, the plaintiff brought an action against the then Prime Minister of Malaysia, Dato' Seri Najib bin Tun Abdul Hj Razak and the Government of Malaysia alleging that they had committed misfeasance in public office. Nallini Pathmanathan FCJ noted at [182]–[184]:

F The tort relates to deliberate dishonest conduct and abuse of power by a public officer. As stated in *Three Rivers* (per Lord Steyn) the rationale underlying the tort is that 'in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes ...

G The quintessence of the rule of law is that no man is above the law and that all men are equal before the law. This tort therefore serves to protect citizens against abuse of power by public officials. *To that extent it is distinctive in that it combines both public and private law elements, unlike other torts which are wholly private in nature*. (Emphasis added.)

H

[38] It is clear from the foregoing, that a claim based on the tort of misfeasance in public office is based on both public and private law elements, and that being so, O 53 which applies to public law complaints does not apply here.

I

CONCLUSION

[39] In my opinion, for the reasons I have given, the statement of claim in this action is not an obvious case for striking out. On the material before me, I

certainly cannot say that it discloses no reasonable cause of action or that the claim is frivolous or vexatious or amount to an abuse of process of the court. I therefore dismiss the defendants application to strike out the plaintiffs claim.

Application dismissed.

Reported by Michelle Yee